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INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION,

Case No. 20-RC-256091

Petitioner,

and

TARTINE JV HOLDINGS, LLC,

Employer.

PETITIONER INTERNATIONAL LONGSHORE AND WAREHOUSE UNION'S BRIEF IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

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I. INTRODUCTION

Petitioner International Longshore and Warehouse Union ("ILWU"), submits the following Opposition to Employer's Request for Review of the Regional Director's Decision dated October 6, 2020.

The Employer first challenges the Regional Director's finding that Kyle Lypka was an eligible voter. The Regional Director properly found that, prior to the eligibility cutoff date of February 16, Tartine effectively employed Kyle Lypka as a probationary employee by paying him to work a "trial shift," during which he performed the duties of a server, including serving customers, plating food, and cleaning up. *See* DPE[1] at p. 6-7. As a condition of permanent employment, Lypka was required to successfully complete two trial shifts. The Regional Director held that Lypka's expectation of passing the trial period, and of continued employment, were never reasonably in dispute because, among other reasons, Lypka was an experienced server/cashier from another Tartine location, he was not required to complete a formal application and already had a working relationship with a manager at the Bakery, and there was no evidence that Tartine considered any other applicants or transferees for the position. DPE at p. 7. Lypka did, in fact, successfully complete the trial period, and the Employer brought him on as a regular employee: Lypka worked an average of over ten hours per week between his first day of work and the election date. The Regional Director properly held that Lypka was a probationary employee prior to the eligibility date and therefore eligible to vote. *National Torch Tip*, 107 NLRB 1271, 1272-73 (1954).

Despite the Employer's concession that it paid him to perform squarely bargaining unit work prior to the eligibility cutoff date, and that Lypka worked the trial period in contemplation of future employment, the Employer urges the Board to brush these undisputed facts aside and declare Lypka ineligible simply because prior to the eligibility date, Tartine had not offered him a

[1] The Regional Director's Decision on Petitioners Exceptions to Certain Findings in the Hearing Officer's Report, dated October 6, 2020, is cited as "DPE," followed by the page number. The Hearing Officer's Report on Challenged Ballots, dated August 20, 2020, is cited as "HOR," followed by the page number. The Employer's Request for Review, dated October 20, 2020 is cited as "ERR," followed by the page number. The Employer's Post-Hearing Brief, dated July 16, 2020, and submitted to the Hearing Officer, is cited as "EPHB," followed by the page number.

permanent position and had not placed on the schedule or on payroll. However, there is no basis in law for a special test to determine whether someone is "hired": rather, the decades-old test for determining eligibility is "the clear, objective fact of actual work on the eligibility dates." *F. & M. Importing Co.*, 237 NLRB 628, 632–33 (1978). Rather than being an issue of first impression, as the Employer urges, Lypka's case presents the familiar situation where an employee is required to satisfactorily complete a trial or probationary period before achieving permanent status. Because he meets the test for probationary employee, Lypka is an eligible voter, and his ballot should be opened and counted.

The Employer also improperly seeks to challenge the Regional Director's pro forma adoption of the Hearing Officer's decision that Julian Cox and Victor Harvey worked insufficient hours to be eligible voters, despite the fact that the Employer **did not file <u>any</u> exceptions to the Hearing Officer's Report, and did not otherwise raise any issue with respect to Cox or Harvey to the Regional Director prior to seeking review**. Because the Employer did not raise these issues to Regional Director, it has waived its position as to these voters. *See* Board Regulation 102.67(e). But, even if the Employer had not waived its argument that Harvey and Cox were eligible to vote, it is beyond dispute that both employees, who were hired immediately prior to the eligibility cutoff date, were in no sense regular employees, and worked well below four hours per week between their hire date and the election date. *See New York Display & Die Cutting Corp*., 341 NLRB 930 (2004). No exception to this rule applies.

The Board should deny the Employers' Request for Review in its entirety.

II. THE REGIONAL DIRECTOR PROPERLY FOUND THAT KYLE LYPKA WAS AN ELIGIBLE VOTER

A. Statement of Facts

Tartine is a company that operates multiple locations throughout the Bay Area, including Tartine Bakery, located in San Francisco's Mission District, and Tartine Berkeley, located in Berkeley. Transcript ["Tr."] at 30. Kyle Lypka first started working for Tartine in November 2019, at its Berkeley location, as a server/cashier. Tr. 142. Lypka's boyfriend worked at the Employer's

San Francisco Bakery location; in the end of December 2019, or early January 2020, Lypka decided to transfer to the Bakery location, and his boyfriend put him in touch with their mutual acquaintance, Renee Vasquez, Assistant General Manager at the Bakery. Tr. 110; Tr. 142-143. According to General Manager Zach Taylor, Lypka's application process was "a little different" because Lypka knew Vasquez, and had worked at the Berkeley location. Tr. 111. Instead of submitting a formal application, "he had pretty much, I believe, just been in contact with her." *Id*.

Prior to being formally placed on payroll, Tartine pays its employees for working two "trial shifts." Tr. 106. During typical trial shifts at the Bakery, front of house employees perform identical duties to servers/cashiers: they take orders from customers, box up pastries, plate food, and bring the food to the cashier or customer. Tr. 130-32. In exchange for their work, trial shift workers are paid minimum wage. Tr. 117-18. The Employer did not present evidence that any trial shift employee had ever previously not been offered a position.

As General Manager Taylor conceded, because individuals are *actually working* during trial shifts, Tartine considers them legal employees, and complies with all employment laws for work performed during trial shifts:

> Q Okay. Now, as general manager, you know that when it comes to employees, there are laws that Tartine must comply with, right?
>
> A Yes.
>
> Q And so with any worker that Tartine employs, it follows the law?
>
> A Yes.
>
> Q And so these laws include federal employment laws, right?
>
> A Yes.
>
> Q And -- and there's state employment laws, and city and county employment laws that Tartine must always follow?
>
> A Yes.
>
> Q For example, you have to pay the minimum wage, right?
>
> A Yes.

Q And in San Francisco, I believe that's 15.59 per hour; is that correct?

A Yes. It is.

Q Okay. And you also have to deduct taxes, like payroll taxes, right?

A Yes.

Q Whenever you pay an employee, these are things that just have to be done whenever an employee is working, right?

A Yes.

Q And -- and you pay employees for trial shifts, correct?

A Yes.

Q You pay employees minimum wage for trial shifts?

A Yes.

Q And you comply with the law when it comes to payment for trial shifts, right?

A Yes.

Q Because employees are actually working, right?

A Yeah. Well, yeah.

Tr. 132-133. Tartine's own Director of Retail Operations, Scott Mosier, also understood trial shift workers to be employees. While Mosier disagreed with the Bakery's practice of allowing new hires to work trial shifts prior to filling out new hire paperwork, he clearly considered them employees:

Q Are you familiar with a trial shift concept in the Tartine portfolio?

A Yeah, I heard about it earlier in one of the witness's testimony at the bakery cafe in Tartine Bakery, Guerrero Street.

Q Is that process similar or different to the process of onboarding at 9th Avenue?

A Very different, yeah. *I wouldn't allow an employee in my restaurant* unless they were completely onboarded and set up in the payroll system. I believe there's probably insurance issues.

Tr. 417 (emphasis added).

On February 5,[2] Bakery manager Vasquez texted Lypka about working trial shifts. Ex. U-21[3]. Vasquez wrote:

> hey kyle! thanks for coming in today. what does your schedule look like for this week & next? I would like to ideally get your trial shifts scheduled soon, so once those open shifts become available at the end of the month, it'll be a smooth transition.

Ex. U-21. Vasquez did not state that Lypka would be required to undergo further interviews following the trial shift, and her use of the phrase "it'll be a smooth transition" reflects the understanding that Lypka *would in fact* take hold a permanent position following the completion of the trial period. What was conveyed to Lypka, and what he understood, was that if he successfully completed the trial shifts, he would be given permanent employment as a server/cashier. When Lypka was asked whether he understood the trial shifts to be part of the application process, he stated: "I understood them as more of a formality, because that's just what everyone does." Tr. 159. Consistent with Lypka's understanding, Taylor testified that every employee at the Bakery completes a trial shift before being placed on payroll; Taylor did not challenge Lypka's understanding that the shifts were, in fact, a formality. Tr. 110.

The undisputed evidence shows that Lypka was paid for performing bargaining unit work for the duration of his trial shift on February 14, prior to the eligibility cutoff date of February 16, and that he worked the shift with the understanding he would be offered permanent employment. The server/cashier position is responsible for helping guests, boxing up pastries, answering questions, running food, ringing up guests, cleaning, setting up the bakery, and closing down the bakery. Tr. 125. On February 14, Lypka worked the line, took customers' orders, packaged and plated food, ran orders from the kitchen out to the tables, cleaned, and bussed tables. Tr. 149-150. For the first 45-minutes of the shift, he was supervised by Vasquez; after the initial 45 minutes, Vasquez went to her office upstairs, and Lypka continued to perform all duties of a server until the

[2] Unless otherwise noted, all dates in this brief are in 2020.
[3] Union Exhibits are cited as "Ex. U-[Exhibit Number]." Employer Exhibits are cited as "Ex. E-[Exhibit Number]." Joint Exhibits are cited as "Ex. J-[Exhibit Number]."

end of the shift. Tr. 146; 149-151. Lypka described the work as a server/cashier at the Bakery location as "essentially the same job" as working as a server/cashier at the Berkeley location. Tr. 150.

Lypka was paid in cash for his work on February 14, 2020. Tr. 117-18. Tartine's cash reports show that Lypka was paid a total of $46.77 for a three-hour trial shift worked on February 14, 2020, which is a rate of $15.59 per hour: the identical rate of pay Lypka received after he was placed on payroll. Ex. E-6; Tr. 117-18; 151-52. Like all employees, Tartine followed all applicable employment and tax laws in retaining Lypka to perform this work. Tr. 132-133.

The Employer presented no evidence that it was considering other applicants or transferees for the open Bakery position. Nor did it present any evidence that a large percentage of trial shift employees do not continue on to permanent employment, or otherwise refute Lypka's understanding that, given his experience level and conversations with Vasquez, that the trial shifts were anything but a "formality." Tr. 159.

Because he successfully completed this "fleeting probationary period," DPE at p. 6, Lypka eventually filled out tax paperwork and was formally placed on payroll on February 28. Tr. 127-28; Exs. E-8, E-9. Between Lypka's first day of work on February 10, and the election date of March 12, Lypka worked the following dates and hours:

Date Worked Prior to Eligibility Date	**Hours**
2/14/20 (paid in cash)	3
Total Hours Worked:	**3**

Dates Worked Eligibility and Election Dates	**Hours**
2/19/20 (paid in cash)	3
2/28/20	7.2
2/29/20	6.53
3/5/20	7.52
3/7/20	6.77
3/12/20	7.18
Total Hours Worked:	**38.2**

See Exs. E-5, E-6, E-7; Tr. 117-118, 146, 149-151. In total, Lypka worked 41.2 hours between his first day on February 14 and the election date of March 12 (a total of 3.86 weeks), averaging **10.67 hours per week** between his first day of work and the election date.

The Employer considers other workers "hired and working" in factually indistinguishable

circumstances. Cox, another employee at issue in the hearing, was argued by Tartine to be "hired and working" during the single shift he worked prior to the eligibility date on February 10, 2020. EPHB at p. 10 (stating "Cox was hired and working as a Bar Prep employee prior to the eligibility cutoff date"). Like Lypka, Cox worked for Tartine in a different capacity prior to being hired as a "bar prep" employee.[4] Like Lypka, Cox did not fill out new employee paperwork until after the eligibility date: Cox filled out his payroll paperwork on February 17. Tr. 941-42, Ex. U-3. And, like Lypka, the shift Cox worked prior to the eligibility date did not appear on the employer's schedule. Ex. U-2 at p. 8-9. Management also admitted that, at some point after the completion of Cox's shift, management back-entered or "backlogged" the hours Cox worked prior to the eligibility date so that the payments were reflected on his payroll report. Tr. 949, 958-959 (management went into the payroll system and added his hours later).

Notwithstanding these undisputed facts, the Employer's position is that Cox was "hired and working" prior to the eligibility cutoff date, but that Lypka was not.[5] The only difference between Cox and Lypka was that the Employer testified that Cox was hired, and testified that Lypka was not. Tartine Manufactory manager Suzanne Roberts testified:

> Q Now, looking down here, Julian Cox, electronically, it looks like, signed this document on February 17th, 2020, correct?
>
> A Correct.
>
> Q And that was after his first shift of February 10th, 201- -- or 2020, right?
>
> A Yes.
>
> Q Okay. And so he didn't fill this out before he worked that shift, right?

[4] Cox, however, was not Tartine's employee, but was rather an independent contractor, retained to manage its beverage program. Tr. 917; Ex. U-33. The Union argued at hearing that Cox was not an employee covered by the Act, given the overwhelming evidence that Cox was retained as a consultant to design and manage Tartine's entire bar and beverage program. On its face, the consulting agreement between Cox and Tartine had not expired, and Tartine produced no witness with firsthand knowledge about the contract to testify that it had ended. *See* Ex. U-33; Tr. 917-920. The Hearing Officer did not reach the issues of whether Cox was an independent contractor, manager, or if he otherwise shared a community of interest with the unit because it was clear that Cox did not work a sufficient number of hours between his first day of work and the election date to establish regularity of employment.

[5] As discussed further below, the Hearing Officer found, and the Regional Director agreed, that Cox had failed to work a sufficient number of hours to establish regularity of employment.

A He did not, no.

Q Or at the beginning of the shift, right?

A No.

Q But on -- according to you, on -- on February 10th, 2020, he was a Tartine employee, right?

A He was, yes.

Q He was hired and working as of that date, right?

A He was working. He hadn't filled this out yet, obviously.

Q Okay.

A But we prefer -- we -- the goal is always to get it done, you know, especially with brand new employees. With Julian, it was definitely a little more lax, since we didn't have any reason to question his eligibility. And as long as we got the paperwork in by the payroll date, we were a little bit more laxed [sic] about letting him fill it out at his leisure.

Q Okay, all right. And -- but generally speaking, most employees fill this out at the start of their first payroll shift?

A Yeah, there will be handful of times where employees will come in and they'll fill out -- they'll start to fill it out, but they may forget their passport or their ID, and so there are definitely instances where their, you know, their whole, all their paperwork will be incomplete until they get it a couple of days later. So we generally give them -- we do generally give them a window.

Q Okay.

A Yes.

Q So an employee -- a -- an individual or an employee can be employed and working, even if they haven't filled out their payroll document yet, right?

A I mean, it's not the goal, but it has happened, yes.

Tr. 942.

The election was held on March 12, pursuant to the parties' Stipulated Election Agreement. That stipulation provided that the following employees would be eligible to vote:

> Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending February 16, 2020**, including

> employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.
>
> Eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Board Exhibit 1(b), Stipulated Election Agreement at 2. The Stipulated Election Agreement does not use the term "hired" and does not contain any language requiring employees to have been "permanently hired," be "formally placed on payroll," be "reflected on the schedule," or to have "completed all new hire paperwork." The Stipulated Election Agreement also does not exclude probationary, beginner, or trainee employees.

B. Lypka was Employed and Working as a Probationary Employee Prior to the Eligibility Cutoff Date

It is well-settled board precedent that an individual must be "employed and working" prior to the eligibility date. *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958). "[T]he Board's test for employees entering and leaving the unit is **the clear, objective fact of actual work on the eligibility dates**." *F. & M. Importing Co.*, 237 NLRB at 632–33 (emphasis added), *quoting Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517-518 (1973); *see also In Re Dakota Fire Prot., Inc.*, 337 NLRB 92 (2001) (same); *Walter Packing, Inc.*, 241 NLRB at 131 (same); *Cent. Broad. Co.*, 280 NLRB at 511 (same). As the Regional Director correctly concluded, and as the Employer concedes, the Board law uses the phrase "employed and working" and "hired and working" interchangeably. *See* DPE at 4; ERR at 11-12 (stating "[t]he terms 'hired' and 'employed' are used interchangeably and given the same meaning as it pertains to the eligibility of new hires" and characterizing legal standard "hired/employed and working"). Nor does the Employer dispute that "the Board's test for employees entering and leaving the unit is the clear, objective fact of actual work on the eligibility dates." DPE at p. 5, quoting *Roy N. Lotspeich Publicing Co.*, 204 NLRB 517, 517-518 (1973).

As the Regional Director noted, however, there is a dearth of caselaw on situations where an employer argues a worker is paid to perform bargaining unit work before they are officially "hired." DPE at p. 5. However, a simple re-framing demonstrates that Lypka is clearly eligible on

the basis that his continued employment was conditioned on the completion of two trial shifts, and that his status during the trial shifts was identical to that of a probationary employee:

> To be sure, exhaustive research in this area shows a proposition to be illusory and impossible to reconcile; unless, of course, Lypka's "trial" shifts were tantamount to a probationary period. In other words, if the Employer effectively "employed" Lypka (by its dictionary and legal definition) by paying him to work on February 14 and 19, which it did, and if continued employment were conditioned on passing the trial period of those two shifts, which the Employer asserts it was, the Board would traditionally view him as a probationary employee. Viewed through this lens, the circumstances in which the Employer employed Lypka to perform unit work before he was officially "hired" comes into clearer focus. The horse and cart are where they belong, and the legal question is more properly framed and easily answered. Probationary employees are eligible to vote.

DEP at p. 6. Therefore, far from a case of first impression, as the Employer presses in its brief, this case is the familiar situation of that of a probationary or other provisional employee, who holds employment with a reasonable expectation of future employment: "The fact that employees may be given a classification such as beginner, trainee, or probationary employee, and the contemplation of permanent tenure is subject to a satisfactory completion of an initial trial period, has been held by the Board not to warrant their exclusion from the unit." *Johnson's Auto Spring Serv.*, 221 NLRB 809 (1975). That Tartine itself may not use the specific term "probationary employee" to describe trial shift employees, and that its trial period lasts only two days is of no consequence, because Lypka's situation clearly demonstrates he had a reasonable expectation of permanent employment if he successfully completed the trial period. *See, e.g., In the Matter of Firestone Tire & Rubber Co.,* 57 NLRB 342 (1944).

The Employer urges that because Lypka did not complete his on-boarding documents, appear on payroll, or appear on the schedule prior to February 28, Lypka was not "hired," despite its concessions that (1) the "hired and working" test is identical to the "employed and working" standard, (2) Lypka was paid for performing squarely bargaining unit work prior to the eligibility date, and (3) Lypka's continued employment following the trial shifts was conditioned on the successful completion of the trial period. The Employer fails to explain why in this case, the Board should depart from its settled "probationary employee" standard and ignore both the dictionary

and legal definitions of "employee," which establishes that "employees" include workers who are paid in cash and are not on payroll. To adopt the Employer's argument would require the creation of a new special "hire" standard, which would require all eligible voters to fill out on-boarding documents, appear on the schedule, and formally be offered and accept employment prior to the eligibility date. This special test, however, is untenable, and is inconsistent with Board law.

The Employer has failed to meet its burden of demonstrating Lypka is ineligible to vote.

1. The Parties' Stipulated Election Agreement Does Not Require "Employees" to Meet a Special Test for Whether they are "Hired"

The language in the parties' stipulated election agreement provides that employees eligible to vote in the election are those that "were employed during the payroll period ending February 16, 2020." Board Exhibit 1(b), Stipulated Election Agreement at 2. The parties' stipulation does *not* require eligible employees to have been "permanently hired," be "formally placed on payroll," be "reflected on the schedule," or to have "completed all new hire paperwork." The agreement is clear that the parties did *not* agree to a special test for determining whether an employee is "hired;" nor did the parties agree to limit eligibility to permanent, non-probationary, or non-trial employees. Rather, the parties agreed that all employees who were *employed* prior to the February 16 eligibility cutoff date would be eligible to vote.

As discussed in detail below, the NLRA defines "employee" as including "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise…" 29 U.S.C.A. § 152. The Board has interpreted the definition of "employee" broadly. *See, e.g., Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891, (1984). Similarly, the dictionary definition of "employee" is also broad: "a person working for another person or a business firm for pay." *Employee*, Dictionary.com, available at *www.dictionary.com/browse/employee* (last visited October 26, 2020).

Under parties' stipulation and the definitions of "employee," it is clear that Lypka was employed by Tartine during the trial shift. On February 14, Tartine paid minimum wage for three hours of labor performing squarely bargaining unit work: Lypka served customers, plated food,

bussed tables, and cleaned up. Tr. 149-150. Tartine management admitted that it considers trial shift workers employees, because it complies with all applicable employment and tax laws for trial shift employees, including by paying them minimum wage. Tr. 132-133; 417. Therefore, Lypka was "employed" by Tartine during the payroll period ending February 16, and pursuant to the stipulation's plan language, is eligible to vote.

2. The Board's Test for Employees Entering the Unit is the Clear, Objective Fact of Whether They Performed Bargaining Unit Work on the Eligibility Dates, Not Whether They Have Accepted a Permanent Position or Filled Out New Employee Paperwork.

It is well-settled board precedent that an individual must be "employed and working" prior to the eligibility date. *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958). "[T]he Board's test for employees entering and leaving the unit is **the clear, objective fact of actual work on the eligibility dates**." *F. & M. Importing Co.*, 237 NLRB at 632–33 (emphasis added), *quoting Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517-518 (1973); *see also In Re Dakota Fire Prot., Inc.*, 337 NLRB at 92 (same); *Walter Packing, Inc.*, 241 NLRB at 131 (same); *Cent. Broad. Co.*, 280 NLRB at 511 (same).

The Regional Director noted, and the Employer does not appear to dispute, that the Board has used the terms "employed and working" and "hired and working" "interchangeably for more than forty years when describing the same eligibility rule." DPE at p. 4. The Board has never used a special test for determining whether someone is "hired." Regardless of the terminology used, the legal test remains "the clear, objective fact of actual work on the eligibility dates." *F. & M. Importing Co.*, 237 NLRB at 632–33. This standard was expressly developed in reaction to employer manipulation of voter lists through hollow claims that individuals were "hired" right before the eligibility date but who had not actually performed bargaining unit work.

a. Development of the "Employed and Working" Standard.

The Board first introduced the "employed and working" standard in 1946, where it was tasked with interpreting a Direction of Election, which provided that eligibility to vote in the election was limited to "employees who were employed during the pay-roll period immediately

preceding the date of this Amendment, including employees who did not work during the said pay-roll period because they were ill or on vacation or temporarily laid off…" *In the Matter of Gen. Chem. Works*, 67 NLRB 174, 175 (1946). In that case, immediately before the eligibility cutoff date, the employer had purportedly hired an employee, but the employee had not commenced work prior to the eligibility date. The Board reasoned that, based on the language of the Direction of Elections, only employees *actually working* in the unit during the payroll period were eligible voters:

> It is apparent from the wording of the Direction of Elections, as amended, that only employees in the unit *working* at the Nichols plant during the December 1-15, 1945, period were eligible, for the portion of the Direction emphasized above exempted from this requirement only those employees in the unit who were *not working* at the plant for certain specified reasons.

Id. at 175. The fact that the employer had placed the individual on its payroll was not the operative question: rather, because the individual not *working* at the plant prior to the eligibility date, he was ineligible to vote in the election.

Subsequent cases emphasize that the critical inquiry is whether the disputed employee has actually *commenced work* at the location prior to the eligibility date, and not whether an employee has been placed on payroll or formally hired. *See Remington Rand Corp.*,74 NLRB 447, 449 (1947) (although employee was "hired prior to eligibility pay-roll date, she did not commence working" until after the eligibility cutoff date, and therefore had not "**commenced work** prior to or during the pay-roll period which determined eligibility.") (emphasis added); *In the Matter of the Goldenberg Co.*, 77 NLRB 335, 339 (1948) (where employee had not "**commenced work** before or during the pay-roll period," she was ineligible) (emphasis added); *Barry Controls, Inc.*, 113 NLRB 26, 27 (1955) (to be eligible, "an individual must be *employed and working* on the established eligibility date" and because the employee "had not **begun work** on the eligibility payroll date," he was ineligible) (emphasis added).

One of the most frequently cited cases for the pre-work eligibility standard, is *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958). In that case, the Board rejected the employer's contention

that an individual who it claimed had been "hired" prior to the eligibility date, but who did not start work until after the eligibility date, was eligible to vote:

> In its exceptions, the Employer contends that Hyman was an employee within the meaning of the Act, and therefore eligible to vote, because she was hired and placed on the payroll on March 15. We find no merit in this contention. It is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for one of the reasons set out in the Direction of Election.

Id. at 1446–47. *Ra-Rich* thus expressly held that the hire date does not determine eligibility, and that the relevant question is when the individual *actually started working*.

In 1973, the Board further clarified the "employed and working" standard, holding that:

> In determining employee eligibility, the Board has long adhered to the following rule set forth in *Ra-Rich Manufacturing Corporation*, 120 NLRB 1444, 1447: "It is well settled that, in order to be eligible to vote, an individual must be employed *and working* on the established eligibility date, unless absent for one of the reasons set out in the Direction of Election." . . . Under this rule, the Board has held consistently that employees who are hired on the eligibility date, but do not report for work until a later date, are ineligible to vote. . . **Thus, the Board's test for employees entering and leaving the unit is the clear, objective fact of actual work on the eligibility dates.**

Roy Lotspeich Pub. Co., 204 NLRB 517, 517-18 (1973) (citations omitted) (emphasis added); *see also In Re Dakota Fire Prot., Inc.*, 337 NLRB at 92; *Walter Packing, Inc.*, 241 NLRB at 131; *Cent. Broad. Co.*, 280 NLRB at 511. In other words, the Board has repeatedly and explicitly held that eligibility *does not turn* on the date the employer says the person is "hired" or is paid for doing something that is *not* bargaining unit work: the question is objective, and it is whether the individual actually performed unit work on the eligibility cut-off date and the election date.

Numerous other cases are in accord. *See, e.g.*, *Dyncorp/Dynair Servs., Inc.*, 320 NLRB 120 (1995) ("'[i]t is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for one of the reasons set out in the Direction of Election.' A subsidiary Board rule defines "working" as the actual performance of bargaining unit work."); *Emro Marketing Company*, 269 NLRB 926, 926 (1984) ("The Board has

consistently held that in order to be 'employed during the payroll period' and be eligibile [sic] to vote, an employee must perform unit work during the payroll period. . ."); *Weather Shield of Connecticut*, 300 NLRB 93, 107 (1990) ("the crucial date is **not when the [demoting] decision was made,** but rather when he **actually began working** as a nonsupervisory employee") (emphasis added); *Ed Chandler Ford, Inc.*, 254 NLRB 851, 861 (1981) ("It is settled that, in order to be eligible to vote in a representation election, an employee must have **worked in the designated bargaining unit** on the established eligibility date and on the date of the election. In determining eligibility, **the Board looks first to see if the employee in question was actually working in the bargaining unit on the eligibility date**.") (emphasis added).

The Regional Director correctly found that Tartine "effectively 'employed' Lypka (by its dictionary and legal definition) by paying him to work on February 14 and 19." DPE at p. 5-6.

b. As the Employer Concedes, the "Employed and Working" and "Hired and Working" Standard are the Same, and There is No Case That Establishes a Special Test for When Someone is "Hired."

Over time, the phrase "hired and working" began to appear in eligibility cases, but an exhaustive review of the caselaw has revealed no case where the Board has held that there is a separate test to determine whether someone is "hired," or held that an employee can satisfy the "working" prong of the test, but not be considered hired. Rather, when the Board has used the words "hired and working" in reference to the legal standard, the test is identical to the "employed and working standard." The origins of the phrase "hired and working" appear to have developed in response to employer manipulation of voter lists, where employers were claiming certain non-working individuals were "hired" prior to the eligibility cutoff date. The Employer has cited no case holding that in order to be considered an eligible voter, the person must be have filled out new hire paperwork, have accepted a permanent position, or have been formally placed on payroll – unless the employer merely asserts that they hired the employee before completing said paperwork. Rather, the inquiry is always centered on whether the individual is compensated for performing bargaining unit work prior to the eligibility date and, if they are a probationary

employee, whether they have a reasonable expectation of future employment.

Perhaps the earliest case explicitly using the words "hired and working" in reference to the eligibility standard is from *N.L.R.B. v. Family Heritage Home-Beaver Dam, Inc.*, 491 F.2d 347, 349–50 (7th Cir. 1974). In that case, the employer made the familiar case that that an individual who it had purportedly hired was eligible to vote. In using the language "hired and working" to refer to the legal standard, the Court emphasized the operative test was not, in fact, the often disputed date of when the employee was *hired*, but rather when the individual was actually performed work:

> The election direction made eligible those 'employed' during the payroll period. The Board's settled policy is that ordinarily an employee must be both 'hired and working' on the eligibility date in order to participate in a Board-directed election. This rule was adopted to simplify the process of identifying eligible voters: **objective evidence is usually available to pinpoint the time at which an employee commences work while the date of 'hire' is <u>often subject to dispute</u>**.

Id. at 349–50, *quoting* Annot., 69 ALR2d 1191, 1199, § 8 (emphasis added). The use of the term "hired" as part of the "hired and working" language was thus introduced **in reaction to** the Employer's untenable position that non-working individuals that the employer claims to be "hired" are eligible voters. In other words, in using the "hired and working" language, the Board acknowledged the employer's position that the employee was "hired" but rejected that simply being "hired" would establish eligibility; rather the test was the "objective evidence" of when the individual "commence[d] work." As *Family Heritage* recognized, the "hire date" is often subject to dispute and is an unreliable indicator for establishing eligibility.

Other cases make clear that the "hired and working" rule and the "employed and working" rule are indistinguishable and that there is no special test for determining when someone is "hired" apart from simply being an "employee." In *CWM, Inc.-Port Arthur,* 306 NLRB 495 (1992), the Board used the language "hired and working" in reference to the legal standard, but cited *Emro Marketing Co.* and *Roy Lotspeich Publishing Co.* in support of the standard, neither which refer to the eligibility standard as "hired and working," and both of which used the phrase "employed and

working." *See Emro Marketing Co.*, 269 NLRB at 926; *Roy Lotspeich Publishing Co.*, 204 NLRB at 517-518. Similarly, in *N.L.R.B. v. Maryland Ambulance Servs., Inc.*, 192 F.3d 430, 433–34 (4th Cir. 1999), the Fourth Circuit stated the following:

> The Board has long required that, in order to be eligible to vote in a representation election, an employee "must be both 'hired and working' on the eligibility date." *NLRB v. Family Heritage Home–Beaver Dam, Inc.*, 491 F.2d 347, 349 (7th Cir.1974); *see also NLRB v. Dalton Sheet Metal Co., Inc.*, 472 F.2d 257, 258 (5th Cir.1973) (noting that it is well-settled that "an individual must be **employed and working** on the established eligibility date in order to be eligible to vote" in a union election).

N.L.R.B. v. Maryland Ambulance Servs., Inc., 192 F.3d 430, 433–34 (4th Cir. 1999). The Fourth Circuit thus relied on a case applying the "employed and working" standard to explain what it meant to be "hired and working."

In *B.L.K. Steel, Inc.*, 245 NLRB 1347, 1353 (1979), the Board considered the ballot of an individual who was interviewed two days before the eligibility date and who was "told to report for work" on the eligibility date. The employee completed a physical examination on the eligibility date, but did not start actually working until after the eligibility date. The only reason the Board held he was ineligible to vote was because he *had not started working*: it did not ask whether he was formally placed on payroll or had filled out new hire paperwork. Conversely, in *Wilkes-Barre Wholesale Serv.*, 246 NLRB 491, 497 (1979), the union disputed the "hire" date of new employees, and argued they were ineligible because they were not "hired and working" prior to the eligibility date. In light of the conflicting testimony, the Board used the timecards reflecting the hours worked as conclusive evidence that they were "hired and working" before the eligibility date: "Between the conflicting oral recollections of the three challenged men and the three unioneers, I accept the documentary evidence of the timecards, and I therefore find it a fact that the three men were hired, and did work during the week preceding the eligibility date." *Id.* at 497. In reaching its determination, the Board did not look to the schedule, to whether they had filled out new employee paperwork, or whether they had formally accepted a permanent, non-probationary position. Instead, it held that the employees were hired prior to the eligibility cutoff date based on the fact

that their timecards reflected that they had been paid for performing bargaining unit work.

The vast majority of Board decisions describe the legal standard as "employed and working" or "employed during the payroll period." *See, e.g.*, *In the Matter of Gen. Chem. Works*, 67 NLRB at 175; *Associated Bus. Serv.*, 107 NLRB 219, 221 (1953); *Halpern, J., Co.*, 108 NLRB 1142, 1143 (1954); *Grinnell Pajama Corp.*, 108 NLRB 289, 292 (1954); *Barry Controls, Inc.*, 113 NLRB 26, 27 (1955); *Schick, Inc.*, 114 NLRB 931, 934 (1955); *Worthington Corp.*, 119 NLRB 1845, 1846–47 (1958); *Ra-Rich Mfg. Corp.*, 120 NLRB at 1447; *Greenspan Engraving Corp.*, 137 NLRB 1308, 1309 (1962); *Plymouth Towing Co., Inc.*, 178 NLRB 651 (1969); *Roy Lotspeich Pub. Co.*, 204 NLRB 517 (1973); *WCAR, Inc.*, 203 NLRB 1235, 1243 (1973); *Am. Chem. Corp.*, 215 NLRB 94 (1974); *Spray Sales & Sierra Rollers*, 225 NLRB 1089 (1976); *F. & M. Importing Co.*, 237 NLRB at 632; *B.L.K. Steel, Inc.*, 245 NLRB 1347, 1353 (1979); *J. P. Stevens & Co., Inc.*, 247 NLRB 420, 481–82 (1980); *Magnesium Casting Co.*, 250 NLRB 692, 705 (1980); *Ed Chandler Ford, Inc.*, 254 NLRB 851, 861 (1981); *Hilton Inn Albany*, 270 NLRB 1364, 1371 (1984); *Emro Marketing Company*, 269 NLRB 926, 926 (1984); *Amoco Oil Corp.*, 289 NLRB 280 (1988); *Amoco Oil Corp.*, 289 NLRB 280 (1988); *Case Egg & Poultry Co.*, 293 NLRB 941, 943 (1989); *Sisters of Mercy Health Corp*., 298 NLRB 483, 485 (1990); *Ms. Desserts, Inc.*, 299 NLRB 236 (1990); *C & L Sys. Corp.*, 299 NLRB 366, 386 (1990); *Weather Shield of Connecticut*, 300 NLRB 93, 107 (1990); *Heritage Fire Prot., Inc.*, 307 NLRB 824, 835 (1992); *Dyncorp/Dynair Servs., Inc.*, 320 NLRB 120 (1995); *State Equip., Inc.*, 322 NLRB 631, 662 (1996); *In Re Pep Boys-Manny*, 339 NLRB 421 (2003); *Reliable Trucking, Inc.*, 349 NLRB 812, 814 (2007); *Sweetener Supply Corp.*, 349 NLRB 1122, 1124 (2007); *Grapetree Shores, Inc.*, 356 NLRB 316, 323 (2010); *Neises Constr. Corp.*, 365 NLRB No. 129 (Sept. 11, 2017).

In the handful of cases that describe this standard as "hired and working," the Board applied the same factual test as the "employed and working" cases and the Employer has cited no case finding that an employee who worked before the eligibility cutoff date was nonetheless not hired until after the eligibility cutoff date and, therefore was not an eligible voter. *See, e.g.*, *CWM, Inc.-Port Arthur*, 306 NLRB 495 (1992) (using "hired and working" and "employed and working"

interchangeably); *Wilkes-Barre Wholesale Serv.*, 246 NLRB 491, 497 (1979); *Eddyleon Chocolate Co.*, 301 NLRB 887, 893–94 (1991); *Fish Plant Servs.*, 311 NLRB 1294, 1297 (1993); *Brown & Root, Inc.*, 314 NLRB 19, 29 (1994); *Johnson Controls, Inc.*, 322 NLRB 669, 673 (1996); *Atl. Indust. Constructors, Inc.*, 324 NLRB 355, 360 (1997); *In Re Fantasia Fresh Juice Co.*, 335 NLRB 754, 763–64 (2001).

3. Lypka Was a Section 2(3) Employee at the Bakery on February 14.

Finding that Lypka was not "employed" when he was paid for working his three hour shift on February 14, 2020 would be counter to the NLRA's definition of "employee." The NLRA defines the term "employee" as including "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise…" 29 U.S.C.A. § 152. The term is to be taken in its **ordinary meaning**, i.e., as someone who works for another for hire. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 167 (1971).

The Supreme Court has recognized that the definition of "employee" under section 2(3) of the NLRA is broad. In examining section 2(3) and affirming a Board decision that undocumented workers – who, due to their employment status, *could not* have obtained employment authorization, filled out new hire tax paperwork, and who were presumably paid "under the table" – were employees protected by the Act, the Supreme Court noted the expansive scope of section 2(3)'s definition of employee. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891, (1984). It stated:

> The breadth of § 2(3)'s definition is *striking*: the Act squarely applies to "any employee." The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. See 29 U.S.C. § 152(3). Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 891–92 (1984) (emphasis added).

In *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006), the Board relied on *Sure-Tan* to squarely hold that undocumented individuals compensated in cash, "under the table," are

employees eligible to vote in union elections. In that case, the employer challenged seven voters on the basis that they did not have proper authorization to work in the United States. The employer paid these employees in cash, without maintaining proper employment eligibility documentation, or withholding taxes. *Id.* at 831. Following the election, and in response to the Regional Director's request for evidence supporting its ballot challenges, the employer conducted internet searches for the challenged employees, and produced records from an internet database showing that the social security numbers provided by the voters did not match the names given. It then discharged these workers, but continued to "employ a cash basis work force." *Id.*

The Board concluded that the undocumented workers were statutory employees, and that their immigration status was irrelevant to voter eligibility and unit determination issues. The Board did *not* consider whether these workers were "formally hired" in determining their eligibility, nor did it consider them not to be employees on the basis that they had not filled out new employee paperwork. Instead, it had no trouble concluding that the workers were eligible to vote, stating that "[t]he Board has long held that undocumented workers are properly considered 'employees' under Section 2(3)'s **broad definition."** *Id.* at 833, citing *Duke City Lumber Co.*, 251 NLRB 53 (1980), *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

Numerous other cases are in accord. *See, e.g.*, *Duke City Lumber Co., Inc.*, 251 NLRB 53, 54 (1980) ("The Board has consistently held that illegal aliens are employees within the meaning of Section 2(3) of the Act and are entitled to the protection of the Act. Consistent with these principles, employees alleged to be illegal aliens have voted in Board elections and the Board has overruled objections which alleged that such unchallenged voters were illegal aliens."); *Cty. Window Cleaning Co.*, 328 NLRB 190, 200 (1999), *abrogated on other grounds by Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) (because undocumented worker paid in cash was eligible for backpay, it followed that he was an employee and eligible to vote in the election).

The Employer cites *Sunland Construction Co.*, 309 NLR 1224, 1229 (1992) for the proposition that the definition of "employee" under Section 2(3) of the NLRA has a different

meaning than "employed" as used for eligibility purposes. ERR at p. 23, n. 82. In *Sunland*, the Board recognized the very broad definition of "employee," but did *not* hold that the NLRA's definition of "employee" does not apply in determining voter eligibility: rather, the Board explained the non-controversial proposition that, for eligibility purposes, an "employee" is not automatically eligible to vote, and must share a community of interest with the bargaining unit. *Sunland* at 1229. Far from disclaiming the NLRA's definition of employee with respect to whether a worker is "employed," or finding that the definition does not apply in the eligibility context, *Sunland* merely stated that "[u]nder [the community of interest] test, paid union organizers frequently are excluded from voting, either as 'temporary' employees, or because their interests sufficiently differ from those of their coworkers." *Sunland Const. Co.*, 309 NLRB 1224, 1229 (1992).

The NLRB Case Handling Compliance Manual, section 10552.5, "Under-the-Table" Earnings provides also supports the finding that Lypka was "employed" during his initial shift. The manual provides that employees paid under the table are eligible for backpay awards protected just like any other "employee" under the act:

> Any compensation paid for providing service is a form of earnings, regardless of whether it has been properly reported for income tax purposes. Cash or under-the-table earnings obtained during the backpay period should be treated like any other interim earnings.

Finding that Lypka was not an "employee" when he was paid for performing bargaining unit work for the employer would turn the NLRA's definition of "employee" on its head. The Employer's urging that Lypka was not "hired" cannot be harmonized with the Board's longstanding precedent the workers who are never formally placed on payroll, who never fill out tax paperwork, who are only paid in cash, and who never establish employment eligibility are, nonetheless, employees. Under this standard, at what point would a worker paid under the table, who was never be formally placed on payroll, and who never filled out new hire tax paperwork, be considered "hired?" As the Regional Director properly found, "[T]hat the Bakery paid him in cash, rather than through the payroll system, is of no consequence." DPE at 3.

Moreover, colloquial definitions of "hire" clearly encompass the work that Lypka performed for Tartine on February 14. Black's Law Dictionary (11th ed. 2019) defines "hire" as simply, "To engage the labor or services of another for wages or other payment." Merriam Webster defines "hire" as "payment for labor or personal services." *Hire*, Merriam-Webster.com, available at https://www.merriam-webster.com/dictionary/hire (last visited September 8, 2020). In none of these definitions is there a requirement that an individual be on payroll, be permanently hired, have completed all paperwork, or otherwise be asserted by the Employer to have been hired prior to being considered "employed" or "hired."

These sources make clear that Lypka was, in fact, "employed," as prior to the eligibility date, as the employer did offer him a job akin to that of a probationary employee, and Lypka did accept: he was paid to work a February 14 shift, with understanding that if he successfully completed this trial period, he would continue in his Tartine employment.

4. The Employer's Position Requires the Board Adopt a New Legal Test for Whether Someone is "Hired," Which would be Unworkable and Inconsistent with Board Precedent.

Without citing any caselaw supporting a special "hire" test, and while conceding that there is no material difference between an "employed and working" and "hired and working" standard, the Employer nonetheless urges that in order to be eligible Lypka must have (1) been offered, and accepted, a permanent, rather than probationary, position, (2) appeared on the employer's schedule, and (3) filled out all new employee paperwork. ERR at p. 15-18. To adopt such a position would require the Board to create an unestablished legal test for determining Lypka's eligibility. But in fact, when applied, this test has only one determinative factor: whether the employer states that the employee was hired before or after the eligibility cut-off date.

The unworkability of the Employer's position is illuminated when Lypka's eligibility is compared to its position on Julian Cox's eligibility, who the Employer argued was "employed and working" prior to the eligibility cutoff date despite striking factual similarities between the two. Like Lypka, Cox was paid for working a single shift prior to the eligibility cutoff date. Ex. U-12 (Cox's pay for working February 10, 2020); Ex. E-6 (Lypka's pay for working February 14, 2020).

Like Lypka, Cox did not fill out new hire paperwork until after the eligibility cutoff date of February 16. Ex. U-32 (Cox paperwork signed February 22, 2020); Ex. U-3 (Cox withholding certificate and other new employee paperwork, signed February 17, 2020); Ex. E-8, E-9 (Lypka paperwork signed February 28, 2020). Like Lypka, Cox did not appear on the Hot Schedules program prior to the eligibility cutoff date. Ex. U-2 at p. 7-8 (Manufactory schedule for February 10-16, 2020, which does not reflect Cox's February 10, 2020 shift). Like Lypka, Cox did not clock in and clock out through Toast during his shift prior to the eligibility date. Tr. 954-958 (testimony that Cox's hours were "backlogged," or entered by management after the dates he worked, rather than him clocking in through the employer's timekeeping software). Like Lypka, Cox had a connection to Tartine prior to his first day, but unlike Lypka, it was not in an employee capacity, and had never previously filled out employee paperwork: he had worked as an independent contractor to manage Tartine's entire bar program. Ex. E-33; Tr. 941. Despite these factual similarities, the Employer insisted that Cox, but not Lypka, satisfied the "hired and working" test. EPHB at p. 10 (stating "Cox was hired and working as a Bar Prep employee prior to the eligibility cutoff date").

The only material difference between Cox and Lypka is that Tartine's manager testified that Cox was "hired" before the eligibility cutoff date, and that a manager went into Tartine's system *after* he worked his shift to retroactively add his hours so they would be reflected on payroll reports. Tr. 949 (management went into the system and "backlogged" Cox's hours after the fact); 14. Ex. E-6; Tr. 117-119 (cash report, rather than payroll report, reflecting Lypka was paid minimum wage for working before the eligibility cutoff date).

The Employer's blatantly inconsistent position with respect to Lypka and Cox highlights the unworkability of a special "hire" test as urged by the Employer – here, in the *same case*, the Employer has taken two completely contrary positions where the clear, objective facts show that both workers were compensated for performing work[6] prior to the eligibility date. As recognized

[6] The Union argued below and maintains that Julian Cox was not actually performing bargaining unit work prior to the payroll eligibility date. The evidence showed that during his single shift prior to the eligibility date, Cox's independent consulting agreement was still in effect, and that prior to the eligibility date he worked in in his consulting

for decades, reliance on an employer's claim as to when an individual is "hired" simply cannot be the eligibility test. The only workable test is the test used by the Board, for decades: "the clear, objective fact of actual work on the eligibility dates." *F. & M. Importing Co.*, 237 NLRB at 632–33.

The absurdity of the Employer's position is further highlighted because the Employer *itself* understood Lypka to be an employee during his trial shifts. As the Employer admitted, it considered Lypka to be an employee during his February 14 shift. Tr. 132-133. Tartine hired Lypka to work on February 14: during that trial shift, Lypka conferred a tangible benefit upon the employer when he served customers, cleaned the bakery, and plated food during. In exchange, Tartine paid Lypka for his time, at minimum wage, because Tartine understood Lypka to be an employee during the trial shift and knew that, by law, it was required to pay him minimum wage and comply with other employment and tax laws. Tr. 132-133; Ex. E-6.

Surely the employer's *own understanding* that Lypka was, in fact, an employee during his trial shift, and that Tartine had to follow all employment and tax laws with respect to his employment during this shift must override any contention by the employer that Lypka was not, in fact, employed and working during his shift on February 14, 2020. Particularly given the NLRA's widely expansive definition of "employee," Lypka cannot be considered an "employee" for minimum wage or tax purposes, but not an "employee" under the NLRA.

The impracticality of a special test to determine when someone is "hired" is highlighted when the facts are slightly modified. How would such a standard work if Tartine's policy was to pay cash to purported "applicants" for performing squarely bargaining unit work for a one-month period of "trial shifts" prior to "being hired?" Or what if Tartine's policy was that one *year* of trial shifts would need to be performed prior to being considered "hired?" In such a circumstance, and as discussed next, it would be clear that the purported "applicant" was, in fact, a probationary employee, and an eligible voter.

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role managing Tartine's Bar and Beverage program. Tr. 1081-82; Ex. U-33. However, resolution of this matter is not necessary to dispose of the Employer's Request for Review.

5. Lypka is Eligible to Vote Because He Worked the Trial Shift with a Contemplation of Permanent Tenure, Subject Only to the Satisfactory Completion of the Initial Trial Period.

Given that it was undisputed that Lypka was paid for performing bargaining unit work prior to the eligibility cutoff date, the Regional Director properly framed the question as whether Lypka's status was akin to that of a probationary employee. Given that Lypka – an experienced server/cashier, who was transferring over from Tartine's Berkeley location to perform nearly identical job duties at its Bakery location – was told, and understood that, if he successfully completed two trial shifts he would be offered permanent employment, Lypka's status on February 14 falls squarely under the legal definition of probationary employee.

Employees who are employed "with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period," prior to the eligibility cut-off date are considered probationary employees eligible to vote in union elections. *National Torch Tip,* 107 NLRB at 1273. In *National Torch Tip*, the Board held that "trainees" who were placed on a 90-day probationary period were eligible voters. It reasoned that because the probationers "do the same work as the regular employees, and are accorded the same general working conditions, including hospitalization, holiday pay, and bonuses (after 30 days)," and because their offer of permanent employment depends only on the "the satisfactory completion of an initial trial period," they were eligible to vote. It rejected the contention that the eligibility of probationary employees should "turn on the proportion of such employees, willingly or not, fail to continue in the employ of the employer." *Id.* at 1273. Because the "general working conditions" of the probationary employees, and their employment interests were similar to the other employees, there was no reason to deny them the right to vote. *Id*.

The Board has consistently reaffirmed the *National Torch Tip* rule that individuals who hold their employment with a reasonable contemplation of permanent employment, subject to the satisfactory completion of a trial period, are eligible to vote. *See, e.g*., *Vogue Art Ware & China Co.*, 129 NLRB 1253, 1254 (1961); *Gulf States Tel. Co.*, 118 NLRB 1039, 1041 (1957).

a. That Tartine May Not Use the Term "Probationary Employee" to Describe Trial Shift Workers is Insignificant

The Employer harps on the purported fact that the Bakery does not use the specific classification of "probationary employee" for employees who work trial shifts, and therefore that the eligibility test for probationary employees should not be used with respect to Lypka. *See* ERR at 18, 19. But what term the employer uses to describe an employee working a trial period – whether that term is "probationary employee," "trainee," or "trial shift worker" is not relevant to the analysis – the determinative question is whether the employee works with a contemplation of permanent employment following the satisfactory performance of the trial period. "The fact that employees may be given a classification **such as** beginner, trainee, or probationary employee, and the contemplation of permanent tenure is subject to a satisfactory completion of an initial trial period, has been held by the Board not to warrant their exclusion from the unit." *Johnson's Auto Spring Serv.*, 221 NLRB 809 (1975). The Board's use of the term "such as," followed by a list of different classifications, demonstrates that the term describing the position matters not; rather, what is of import is whether the employment meets the legal test. Moreover, none of the cases describing the rule stand for the proposition that an employer must internally classify an individual working a trial period as a "probationary employee" in order to be eligible: again, what matters is if they meet the legal test. *See, e.g.*, *Vogue Art Ware & China Co.*, 129 NLRB 1253, 1254 (1961); *Gulf States Tel. Co.*, 118 NLRB 1039, 1041 (1957).

Here Lypka squarely meets the legal test: by all indications, he was expected to, and did, successfully complete the trial period. Subsequently, he was offered, and accepted, a permanent position. Therefore, his status on February 14 was akin to that of a probationary employee, and he is eligible to vote.

b. There is No Minimum Amount of Time a Worker Must Be On Probation to Be Eligible to Vote

The Employer perplexingly argues that there should be a set minimum amount of time an employee must serve in a probationary capacity in order to be eligible to vote. While perhaps the most common fact pattern in Board cases involves the eligibility of employees on a 30- or 90-day

probationary period, the Board has recognized the employees on trial periods of two weeks are eligible to vote. In *In the Matter of Firestone Tire & Rubber Co.*, 57 NLRB 342 (1944), the Board evaluated the eligibility of employees working two-week trial periods:

> Newly hired employees are subject to a 2-week trial period before they are considered regular employees. The Company has two employees who had been employed at the time of the hearing about 2 weeks and 1 month, respectively. Although the Company has delayed giving them permanent status, there is no difference in their working conditions from those of the regular employees. Since there is no substantial difference in the status of probationary employees, we find that they are eligible to vote in the election.

Id. at 344. The Board did not even discuss the brevity of that trial period, compared with other cases involving longer trial periods, because the length of the trial or probationary period is not relevant in determining whether a probationary employee shares a community of interest with the unit. The Board's test for eligibility does not turn on how far a probationary employee is into the trial period: a probationary employee working on the first day of a trial period shares the same community of interest as a probationary employee working on the last day of a trial period.

Perhaps more crucially, the Board has never articulated that the probationary period itself must be a certain set number of days in order to qualify as a probationary period. In fact, arguably, the ***shorter*** the probationary period, the greater community of interest that probationary or trial employees share with the unit, since there is a shorter time period during which the employee must demonstrate his or her competence prior to being brought on permanently. Here, the Regional Director found the probationary period "fleeting," and that following this brief period, Lypka gained the status of a permanent employee. DPE at p. 6.

c. Lypka's Employment on February 14 Squarely Satisfies the Legal Test for "Probationary Employee," and His Expectation of Passing the Trial Period Was Never Reasonably In Doubt.

Here, the Regional Director properly found that "Lypka's expectation of passing the trial period and of continued employment were never reasonably in doubt." DPE at p. 7. Lypka was already an experienced server/cashier at Tartine's Berkeley location. The work as a server/cashier at the Bakery location is "essentially the same job" as working as a server/cashier at the Berkeley

location. Tr. 150. Manager Zach Taylor agreed that Lypka had prior experience performing the duties of helping guests, boxing up pastries, and cleaning at the Berkeley location. Tr. 125. Taylor also admitted that because Lypka was already a Tartine employee, and because he was friends with Renee Vasquez, a manager at the Bakery, Lypka did not submit a formal application before transitioning to the Bakery, which was "a little different" from the normal application process. Tr. 110, 111. Instead of going the formal route, Taylor testified "he had pretty much, I believe, just been in contact with [Vasquez]." Tr. 111. Given Lypka's employee status with Tartine prior to his transfer to the San Francisco location as well as his connection to the Bakery's manager, Lypka reasonably believed his transition to the Bakery would go through after successful completion of the trial period, *i.e.*, the two trial shifts during which he was to perform cashier/server duties.

Second, Tartine's own communications and actions made clear to Lypka that he would be permanently hired should he successfully complete the trial shifts – in fact, management's expectation, which it conveyed to Lypka, was that he *would* successfully complete those shifts and go on to permanent employment. In Vasquez's text messages to Lypka prior to his first trial shift, she told him that he would start working open shifts once his trial shifts were completed. Ex. U-21. By using the phrase "it'll be a smooth transition" to describe Lypka's transition from working trial shifts to open, regular shifts, Vazquez communicated to Lypka that once the shifts opened up, that there was little question Lypka *would be* working them – implying that she knew he would successfully complete the trial shifts. Moreover, the communication demonstrates that there were no further steps needed, absent the completion of the trial period, before Lypka's permanent employment at the Bakery would begin. Based on these communications, and Lypka's understanding of the purpose of trial shifts, Lypka had no reason to believe he would not successfully complete the trial shifts and be offered permanent employment: he understood trial shifts to be "**more of a formality** because that's just what everyone does." Tr. 159 (emphasis added). Consistent with this testimony, Taylor testified that every front of house employee at the Bakery completes two trial shifts before being permanently brought on, and did not dispute Lypka's understanding of the shifts as a formality or otherwise testify that the Bakery had ever

declined to onboard an employee after the trial period. Tr. 110. Here, once Lypka successfully completed the initial trial period – i.e., the initial trial shifts – which Tartine management conveyed to Lypka that it fully expected him to do, Tartine provided him permanent employment.

Third, it was made clear to Lypka during the trial shift itself that he would continue on to permanent employment with Tartine. Instead of a manager remaining with him for the duration of his trial shift on February 16, as a manager would do for someone interviewing for a job, Vasquez had Lypka independently perform server work for two hours and fifteen minutes of his three-hour trial shift while she was upstairs. Tr. 146; 149-151. During this time, Lypka worked the line, took customers' orders, packaged and plated food, ran orders from the kitchen out to the tables, cleaned, and bussed tables. Tr. 149-150. As Taylor admitted, the duties of a server/cashier include helping guests, boxing up pastries, running food, ringing up guests, and cleaning the bakery. Tr. 125.

Fourth, Lypka shared the same general working conditions as other employees during his shift. Lypka worked in the same location as other employees and performed server duties. Lypka did not receive special treatment during the shift; for the majority of the shift, manager Vasquez left him unattended to perform server job duties. Tr. 149-150. Moreover, each and every front of house employees had all previously worked a trial period prior to permanent employment. Tr. 110. Lypka was also paid minimum wage, the identical rate of pay he ultimately made after beginning his permanent part-time position. Tr. 151-152.

Given this overwhelming evidence, the Regional Director properly determined that, "[i]t logically follows that Lypka's expectation of passing the trial period and of continued employment were never reasonably in doubt." DPE at p. 7.

d. The Employer's Efforts to Characterize Lypka as an "Applicant" Are Unavailing, Because the Employer Concedes that it Treated Lypka as Employed.

Tartine's characterization of Lypka as an "applicant" ineligible to vote is unavailing. Obviously, if the facts were different, and Lypka had only filled out a job application or submitted his resume, but had not been paid to perform bargaining unit work prior to the eligibility date, he would be an applicant ineligible to vote in the election. But here, the evidence is undisputed that

Tartine it chose to *pay* Lypka for performing bargaining unit work prior to the eligibility date, and that it expressly treated him as an employee for tax and minimum wage purposes. Tartine does not explain how, given these facts, Lypka could be considered by Tartine to be an employee for tax and legal purposes, but an applicant for all other purposes.

Tartine also did not present a single example of a purported "applicant" who completed the trial shifts but was *not* brought on as a regular employee. But even in cases where a high percentage of trial or probationary employees do not go on to obtain permanent employment, the Board has still found these employees eligible to vote: "We do not believe, as a matter of policy, that the eligibility of probationary employees should turn on the proportion of such employees who, willingly or not, fail to continue in the employ of the employer throughout the trial period." *National Torch Tip*, 107 NLRB at 1273; *see also Johnson's Auto Spring Serv.*, 221 NLRB 809 (1975) (finding trainees eligible to vote, where of thirteen trainees hired in a one-year period, only one went on to permanent employment). And, as the Regional Director noted, even in cases where a probationary employee's continued employment is "conditioned on their qualifications, suitability, and on the volume of the employer's business," they are still deemed eligible to vote. DPE at p. 6, citing *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960).

Simply because Tartine conveniently labels Lypka as an "applicant" when he worked the trial shift cannot overcome the undisputed fact that during that shift, Lypka worked under the same working conditions as other employees, performed identical duties to servers, and was paid the identical rate of pay as after he was placed into regular shifts. The Regional Director correctly found that Lypka was a probationary employee eligible to vote.

C. Lypka Worked a Sufficient Number of Hours to Demonstrate Regularity of Employment.

The Regional Director properly found, and the Employer does not dispute, that Lypka worked a sufficient number of hours to demonstrate regularity of employment. DPE at p. 7. Lypka worked the following hours between his first day of work on February 14, 2020 and the election date of March 12:

Date Worked Prior to Eligibility Date	Hours
2/14/20 (paid in cash)	3
Total Hours Worked:	**3**

Dates Worked Eligibility and Election Dates	Hours
2/19/20 (paid in cash)	3
2/28/20	7.2
2/29/20	6.53
3/5/20	7.52
3/7/20	6.77
3/12/20	7.18
Total Hours Worked:	**38.2**

See Exs. E-5, E-6, E-7; Tr. 117-118, 146, 149-151. In total, Lypka worked 41.2 hours between his first day on February 14 and the election date of March 12 (a total of 3.86 weeks), averaging **10.67 hours per week** between his first day of work and the election date. *See New York Display & Die Cutting Corp*., 341 NLRB 930 (2004). This average is well above the minimum four hours of work per week needed to establish regularity of employment.

The Regional Director properly found that Lypka satisfies the Board's eligibility requirements, and that Lypka's ballot should be opened and counted. DPE at p. 7.

III. THE EMPLOYER HAS WAIVED ITS RIGHT TO REQUEST REVIEW OF THE ELIGIBILITY OF VICTOR HARVEY AND JULIAN COX

Board Regulation 102.69(c)(2) provides the parties of an election conducted pursuant to a stipulated election agreement have the right to Board Review pursuant to Board Regulation 102.67. Board Regulation 102.67(e) is clear that a request for review to the Board "may not raise any issue or allege any facts not timely presented to the Regional Director." *See also Wolf Creek Nuclear Operating Corp.*, No. 14-RC-160836, 2016 WL 519262 (Feb. 9, 2016) ("The Petitioner's argument that the Employer is precluded from arguing that the security training instructors are managerial employees is not properly before us because the Petitioner did not timely present this issue to the Regional Director, but, instead, raised this issue for the first time in its Request for Review"); *Pomona Valley Hosp. Med. Ctr*., No. 21-RC-166499, 2017 WL 6464196, at n.1 (Dec. 15, 2017); *Whelan Sec. Mid-Atl., LLC*, No. 05-RC-220538, 2019 WL 656264, at n.1 (Jan. 11, 2019), citing Board Rules and Regulations, Sec. 102.67(e); *Island Hosp. Mgmt. II, LLC*, No. 29-RC-235501, 2019 WL 7584372, n.1 (Nov. 21, 2019).

Following hearing, the Employer submitted a Post-Hearing Brief to the Hearing Officer, which argued that based on their hours worked between their hire date and the *eligibility* date (a period of just two days for Harvey, and just seven days for Cox), Harvey and Cox were eligible to vote. *See* EPHB at pp. 3-4, 10. The Employer did not argue that certain periods during which Harvey and Cox were absent should be *excluded* from the average hourly calculation. Specifically, the Employer never argued to the Hearing Officer or Regional Director that Harvey and Cox were eligible under *Pat's Blue Ribbons*, 286 NLRB 918 (1987), which held, under very limited circumstances, regular employees who go on formal leaves of absence may have the leave period excluded from the calculation.

The Hearing Officer's Report on Challenged Ballots, dated August 20, 2020, found Harvey and Cox ineligible to vote based on insufficient hours. With respect to Harvey, the Hearing Officer found:

> The record shows that Harvey was working for the Employer both on the eligibility date and the election date, as required by Board law. *Roy Lotspeich Publishing Co*., 204 NLRB 517 (1973). During the period for consideration that was used in *New York Display & Die Cutting Corp.*, which is most favorable to Harvey, he worked a total of 13.3 hours divided by 5 weeks, for an average of 2.63 hours, which is well below the 4-hour minimum that the Board used in *Davison-Paxon Co*., *Modern Food Market*, and *New York Display & Die Cutting Corp.* Accordingly, Harvey did not work a sufficient number of hours and is not an eligible voter.

HOR at p. 6 (footnotes omitted). The Employer did not **file any exceptions to this finding**, nor in any other respect presented to the Regional Director any issue as to the Hearing Officer's conclusions on Harvey.

Similarly, with respect to Cox, the Hearing Officer held:

> Using the period for consideration that was used in *New York Display & Die Cutting Corp.*, Cox worked a total 15.5 hours divided by 5 weeks, for an average of 3.1 hours a week, which is below the requisite 4-hour minimum. During the period for consideration that was used in *Modern Food Market*, which is most favorable to Cox, he worked 7.5 hours on his hire date of February 10. However, all of those hours were worked in a single shift.

HOR at p. 7. In evaluating Cox's hours worked prior to the eligibility date, the Hearing Officer

further noted: "In the instant case, Cox's single shift on the day that he was first hired can hardly be considered to show 'regularity of employment.' Accordingly, Cox did not work a sufficient number of hours and is not an eligible voter." *Id.* The Employer also **did not file any exceptions** with respect to Cox, nor in any other respect presented to the Regional Director any issue as to the Hearing Officer's conclusions on Cox.

Because the Employer failed to file any exceptions whatsoever, and did not even raise its *Pat's Blue Ribbons* "leave of absence" argument to the Hearing Officer, *see* ERR at p. 33-34, 36-37, the Employer has wholly failed to timely present the issues of Harvey and Cox to the Regional Director, and has therefore waived its right to request review on both these employees pursuant to Board Regulation 102.67(e).

IV. EVEN IF THE ISSUE WAS NOT WAIVED, HARVEY AND COX BOTH WORKED INSUFFICIENT HOURS TO BE ELIGIBLE TO VOTE

A. Statement of Facts

1. Victor Harvey Worked Sporadically Between His First Day of Work and the Election Date Due to Conflicts with a Second Job, and Averaged Less than Four Hours of Work Per Week.

The only issue with respect to Victor Harvey is whether he worked a sufficient number of hours to establish regularity of employment.

Harvey's first day of work was on February 15, one day before the eligibility date cutoff date of February 16, 2020. Harvey worked a total of **13.13 hours** between February 15, 2020, and the election date of March 12, 2020:

Prior to Eligibility Date	Hours
2/15/20	2
2/16/20	2.97
Total Hours Worked:	**4.97**

Between Eligibility and Election Dates	Hours
2/24/20	2.08
2/29/20	2.05
3/2/20	4.03
Total Hours Worked:	**8.16**

See U.E. 20 and E.E. 19.

There are 3.71 weeks (3 weeks, 5 days) between February 15 and the March 12, 2020 election date. Harvey averaged only **3.54 hours per week** during this period.

The Employer did not present Harvey as a witness, but rather had his manager, Susannah

Ok, discuss his work and his irregularity of employment. According to Ok, Harvey worked a second job at Airbnb as an "a.m. sous-chef for their employee kitchen staff." Tr. p. 875. It was unclear why exactly Harvey had limited availability to work at Tartine in early March, but it appears he may have been sick, and also had a scheduling conflict with his second job: Ok stated, "He was sick or his – and his other job had switched his schedule to be at night that week." Tr. at p. 870. Ok further testified on cross-examination when asked about Harvey's availability in the week preceding the election:

> Q Okay. And I -- I believe that you testified that one of the reasons why he did not work, I think the first week of March, was because he had work at another employer. So was at the Airbnb, the -- the other employer?
>
> A Yes.
>
> Q Okay. And what specifically did he tell you about his work at Airbnb, and his inability to work the first week of March?
>
> A That he would be covering for the p.m. chef that week.

Tr. P. 875.

As discussed below, the minimal hours Harvey worked, apparently due in significant part to his conflicts working at his second job, are insufficient to establish regularity of employment, and he is ineligible to vote.

2. Julian Cox Worked Minimal Hours Between His First Day of Work and the Election Date, and Averaged only 3.5 Hours Per Week Between His First Day and the Election Date.

Cox purportedly first worked on February 10, 2020, five days before the eligibility date. In total, records reflect that Cox worked a total of **15.5 hours** between February 10 and the election date of March 12:

Prior to Eligibility Date	Hours
2/10/20	7.5
Total:	**7.5**

Between Eligibility and Election Dates	Hours
2/25/20	4.0
2/27/20	4.0
Total:	**8.0**

U.E. 12. Cox averaged only **3.50 hours per week** in the 4.43 weeks (4 weeks and 3 days) between

his purported February 10, 2020 hire date and the election date.

The Employer also did not have Cox testify firsthand about the irregularity of his employment between his first day of work and the election date of March 12. The only witness to testify about Cox's lack of work was the Manufactory's General Manager, Suzanne Roberts, who stated that in early March, Cox told her that he had a health emergency with his wife, and that he "would not be able to come to work for the foreseeable future." Tr. 727. There was no agreement made as to when Cox would return to work, as Cox did not give Roberts "a return date." Tr. 727. Other than these vague hearsay statements, the Employer presented no testimony about the nature of the medical emergency.

3. Tartine's Leave of Absence Policies.

Tartine has a Leave of Absence policy for specific types of leave, such as Pregnancy Disability Leave, Organ and Bone Marrow Donor Leave, Family and Medical Care Leave, and Personal Leave. Ex. J-3 (stipulation that Employee Handbook applies to all Tartine locations); Ex. U-17 at 57-75 (Employee Handbook leave policies). However, no testimony was presented that any specific leave was granted to Harvey or Cox.

Pursuant to Tartine's Employee Handbook, neither Harvey nor Cox would qualify for the Family and Medical Care Leave, which includes leave to care for a child, spouse, or parent with a serious health condition. To qualify to take this leave, an employee must be employed by the Company for at least one (1) year of aggregate employment, must have worked 1250 hours, and must meet other requirements. Ex. U-17 at p. 60. Moreover, the policy states that the leave will not be granted "unless [the employee] submits a written request for family and medical care leave stating the beginning date and length of such leave." Ex. U-17 at p. 63. There is no evidence that either Harvey or Cox submitted such a written request or were otherwise granted Family and Medical Care Leave. Moreover, as Tartine admitted, the end date of Cox's absence was ambiguous and unknown.

The Handbook also states that an employee may be granted a personal leave of absence at the sole discretion of the company. To be granted such a leave, the employee must submit a "formal

written request for a personal leave of absence." UE 17 at p. 69. Personal leaves cannot exceed thirty days. *Id.* There is also no evidence that either Cox or Harvey formally requested a personal leave of absence, or that Tartine granted them personal leaves of absence.

B. The Hearing Officer Properly Determined Harvey and Cox Were Ineligible to Vote Based on the Minimal Hours They Worked.

When part-time employees perform work on a regular basis and for a sufficient period of time, such that they have a substantial and continuing interest in the wages, hours, and working conditions of full-time employees, they will be considered regular part-time employees and eligible to vote in an election. *Farmers Insurance Group*, 143 NLRB 240, 244–245 (1979). Part-time employees are eligible to vote if they are "regular" and average at least four hours per week in the 13 weeks preceding the eligibility date. *Davison-Paxon Co.,* 185 NLRB 21, 23–24 (1970). However, the *Davison-Paxon* test is applied flexibly, in an effort to "permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992).

Far from applying a "mechanical and rigid eligibility formula," *see* ERR at p. 31, the Hearing Officer recognized that the Board relaxes or expands the *Davison-Paxon* test with respect employees who are hired shortly before the eligibility date, and may use an alternate period to evaluate regularity of employment. HOR at p. 6-8. As the Hearing Officer correctly explained, employees who begin work shortly before the eligibility cutoff date, and who average at least four hours per week between their first day of work and the election date, are regular part-time employees. *See, e.g.*, *Stockham Valve and Fittings, Inc.*, 222 NLRB 217 (1976) (employees who started five weeks prior to election and who were frequently absent in the weeks preceding the election were regular part-time employees where their work hours averaged at least for hours per week from first day of work to date of the **election**); *Arlington Masonry Supply*, 339 NLRB 817, 819 (2003) (part-time employee who began working ten days prior to the eligibility date and averaged slightly over nine hours per week during a month and one half period between hire and

election date was an eligible employee).

In determining Harvey and Cox were ineligible to vote, the Hearing Officer relied on the indistinguishable case *New York Display & Die Cutting Corp*., 341 NLRB 930, 931 (2004). In *New York Display*, the Board evaluated the eligibility of an employee hired five days before the eligibility date and nine days before the election date. The Board explained in circumstances where an employee is hired very close to the election date, there is a need to expand the period of consideration to determine regularity of employment from the date of hire to the election date:

> [T]he Board simply noted in *Arlington Masonry* that, because the employee had only worked 10 days prior to the eligibility date, it would expand the period of consideration (for calculating the employees' hours) to include the election date, pursuant to *Stockham Valve & Fittings, Inc.*, 222 NLRB 217 (1976).

New York Display & Die Cutting Corp., 341 NLRB 930, 931 (2004), *citing Arlington Masonry Supply*, 339 NLRB 817, 819 (2003) (citations omitted). In that case, because the employee averaged 14.25 hours per week during the two weeks preceding the election, the employee was deemed a regular employee eligible to vote.

Under *New York Display & Die Cutting Corp.*, Harvey worked an insufficient number of hours to establish regularity of employment. There are 3.71 weeks (3 weeks, 5 days) between Harvey's first day of February 15 and the March 12 election date. Harvey worked a total of 13.13 hours during this period. Therefore, Harvey averaged only **3.54 hours per week** between his first day of work and the election date. Similarly, Cox cannot establish regularity of employment. There are 4.43 weeks (4 weeks and 3 days) between Cox's purported February 10, 2020 hire date and the election date of March 12. Cox worked a total of 15.5 hours during this period. Therefore, Cox averaged only **3.50 hours per week** between his first day of work and the election date.

The Employer advances a number of unsupported arguments in an attempt to escape the Cox and Harvey's obvious ineligibility, such as (1) the period to be considered should be between the hire date and eligibility date, despite the fact that this period for either employee is less than one week long; (2) hours worked *after* the election date should be considered; and (3) that if the Board evaluates the hours from the hire date to the election date, certain chunks of time should be

excluded from that analysis. Each argument to depart from the standard *New York Display & Dye Cutting* test is meritless.

1. There is No Basis for the Employer's Position that Harvey and Cox's Eligibility Should Be Determined by Calculating Average Hours Between the Hire Date and Eligibility Date.

The Employer takes the untenable position that an extraordinarily narrow window be determinative of the Harvey and Cox's eligibility, and that eligibility for these new hires should be determined from their first day of work to the eligibility date. The Employer appears to base its argument on *Modern Food Market,* where the Board used the period between the employee's hire date and the eligibility date to calculate the average weekly hours of a part-time employee who began work *nine weeks* before the eligibility cutoff date. *Modern Food Mkt.*, 246 NLRB 884 (1979). In that nine-week period, in only one week did the employee fail to work at least four hours, and in five out of the nine weeks, he worked more than four hours. Based on this pattern of regularity of employment during the nine-week period between his hire date and the eligibility date, the Board determined that instead of looking at the entire thirteen-week period prior to the eligibility cutoff date, the regularity of employment during the nine-week period from the date of hire to the eligibility date was sufficient to establish that the employee shared a community of interest with the unit.

The fact pattern in *Modern Food Market* is a far cry from the factual scenario here. With respect to Harvey's eligibility, instead of looking at a weeks-long period, the Employer urges the Board look at a period of *just two days* – the hours worked on the date of Harvey's hire, on February 15, and the eligibility cutoff date, of February 16 – and take the average number of hours worked from those two *days*. For Cox, the Employer urges that Cox's *single shift* over a five-day period before the eligibility cutoff date establishes eligibility. One or two shifts can hardly be sufficient to demonstrate regularity of employment, or a period from which the Board can extrapolate regularity of employment, and the Employer cites no cases standing for such a proposition. The Employer's position that appropriate period in determining regularity is between Cox and Harvey's hire date and the eligibility date is untenable and has no basis in law.

In addition, the Employer's calculation with respect to Harvey under this theory does not make sense. The Employer impossibly urges that, while the payroll records reflect that Harvey worked a cumulative total 4.97 hours prior to the eligibility cutoff date (worked during the two shifts on February 15 and 16), that Harvey's weekly average prior to the eligibility date somehow averages out to 17.40 hours. *See* ERR at p. 36. This outrageous mathematical contortion reflects a fundamental lack of understanding of the Board's eligibility calculations and grossly misapplies the eligibility test.

2. There is No Basis for the Employer's Alternative Argument that Harvey's Hours Worked After the Election Should Be Considered.

The Employer next improperly urges in the alternative that Harvey's hours worked *after* the election should be considered in determining his regularity of employment. However, it is well-settled that events that arise after the election are irrelevant in determining eligibility:

> [T]he election has already been conducted and the evidence upon which the Employer would have us rely relates exclusively to events which have occurred subsequent to the date of the election. For very practical reasons, we cannot determine voter eligibility on the basis of after-the-fact considerations. Rather, it is necessary that eligibility be fixed as of the date of the election.

Georgia Pacific Corp., 201 NLRB 831, 832 (1973). In *In Re Arlington Masonry Supply, Inc*., 339 NLRB 817, 820 (2003), the Board relied on *Georgia Pacific* in overturning a hearing officer's decision based on an employee's work history after the election:

> The hearing officer erred in relying on Yax's work history *after* the election. It is well established that the Board does not "determine voter eligibility on the basis of after-the-fact considerations."

In Re Arlington Masonry Supply, Inc., 339 NLRB 817, 820 (2003), quoting *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973). There is simply no precedent standing for the proposition that hours worked beyond the election date have any relevance whatsoever to the analysis of regularity of employment, and the Employer's request to consider Harvey's post-election hours is improper. Whatever hours Harvey may or may not have worked after the election date are simply not relevant.

3. There is No Basis to Exclude any Period of Time from the Calculation.

In the alternative, the Employer makes the argument – for the very first time – that the Board should exclude certain periods of time from the calculation due to the employees' absences from work. Even if the Employer had not waived this self-serving argument, there is simply no basis to depart from the new hire part-time eligibility test here.

As a preliminary matter, the Board has recognized the significant utility in the bright-line weekly hourly average test:

> Although the rule may be viewed as substituting rote mathematics for reasoned judgment, it offers the parties a clear, bright line that permits optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment.

Genesis Health Ventures of W. Virginia, L.P., 326 NLRB 1208, 1214 (1998) (quotations omitted). The entire purpose of the test is to properly take into account issues such as employee health and conflicts that interfere with regularity of employment and render employment sporadic. For example, in *Stockham Valve and Fittings, Inc.*, 222 NLRB 217 (1976), two new hires who had personal and medical issues during the first few weeks of their employment were deemed part-time employees because they averaged over four hours per week during the period between their hire dates and the election date. During the second week of employment, one of the employees informed the employer he had broken his glasses and would not be able to return to work without them; he did not work for the ten-day period prior to the election, but did return two days before the election. The second employee was absent from work for a twelve-day period because his child was ill, but returned to work the day of the election. The Board held that these employees were regular part-time employees because (1) their work hours averaged at least four hours per week from *the date of the election*, (2) they were hired at the same time and under the same terms and conditions as other employees, (3) they were hired to fill a "legitimate need of the employer for additional manpower," and (4) their absences appeared to be legitimate and were not questioned by management. *Id.* at 218.

In *Stockham Valve and Fittings*, it was *because* the employees had medical and personal issues which resulted in them working less frequently that the Board applied the bright line test to determine whether they could be considered regular employees. It found them eligible to vote only because they averaged at least four weekly hours – if they had not averaged at least four weekly hours, they would not have been eligible. Rather than choosing to exclude the specific periods where the employees were absence in the calculation, the Board included the entire period in the calculation. There is no basis to depart from the standard here.

The Employer nonetheless arbitrarily urges that period during which Harvey's hours should be evaluated be between February 15, and the week ending March 6 – a date ending one week before the election date. For Cox, the Employer similarly argues that the period to be considered should be between his first day of work on February 10, and February 27, the last day he showed up for work.

These self-serving time periods have no basis in law. In *Pat's Blue Ribbons*, upon which the Employer relies, a regular part-time employee went on maternity leave and returned nine months later, just prior to the eligibility cutoff date. The Board examined her pre-leave and post-leave hours. The employee had worked 248 hours in the two-month period prior to taking leave; after her return to work, she averaged 32.3 hours per week in a nine-week period from her return to the election date. Under such circumstances, the Board concluded she was a regular part-time employee under *Davison-Paxon* and was an eligible voter. In contrast, the Board applied the same reasoning to another employee on maternity leave, who worked 4.5 hours in the two months prior to taking leave, and 14.5 hours upon her return. The Board concluded that this employee was not eligible to vote.

Here, the Employer urges that the Board ignore self-serving chunks of time during the period in question to manipulate the hourly averages of Harvey and Cox. For Harvey, this would mean artificially cutting off the eligibility period arbitrarily early; the Employer suggests the date of March 6. However, unlike in *Pat's Blue Ribbons*, there is no evidence that Harvey was a regular employee before this leave of absence, or that Harvey was on any official leave of absence, for

any legitimate reason, that commenced on March 6. Rather, the evidence is uncontroverted that Harvey's absence was simply due to a *work conflict with his other job*. There is no question that this period must be included in the calculation, because it is highly relevant in demonstrating that Harvey's employment was sporadic, rather than regular.

Similarly, with respect to Cox, the Employer urges that the time period to be considered should be his first day of work on February 10, to his last day of work on February 27, based solely on hearsay testimony that Cox had a family health issue arise. Prior to his absence, however, Cox had also never been a regular employee, and also was not on a formal leave of absence with any specific commencement or end date. Rather, he worked three shifts over a three-week period, and then did not bother showing back up to work after February 27. There is no legal basis to artificially exclude the period between February 27 to March 12.

V. CONCLUSION

For the foregoing reasons, the ILWU respectfully requests that the Board deny the Employer's Request for Review in its entirety.

Dated: October 27, 2020

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109. I hereby certify that on **October 27, 2020**, I caused the foregoing document(s):

PETITIONER INTERNATIONAL LONGSHORE AND WAREHOUSE UNION'S BRIEF IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

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☑ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 27, 2020**, at San Francisco, California.

Leslie Rose